



April 10, 2002

Mr. Kenneth A. Stewart
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701-2483

OR2002-1788

Dear Mr. Stewart:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161076.

The Texas Department of Transportation (the "department") received a request for information relating to its investigation of a claim. You state that the department will release some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). According to one of the submitted documents, the information at issue is part of a completed investigation. Therefore, the department must release the submitted information under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. Sections 552.103 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the

governmental body's interests and may be waived. As such, these exceptions are not other law that makes information confidential for the purposes of section 552.022.¹ Thus, the department may not withhold the submitted information under sections 552.103 or 552.111.

The attorney work product privilege also is found, however, in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). As the department appears to assert that the submitted information constitutes work product, we will consider whether this information is confidential under rule 192.5.

An attorney's core work product is confidential under rule 192.5. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material (1) was created for trial or in anticipation of litigation and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) that a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) that the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. See *National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5, provided that the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). See *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14th Dist.] 1993, no writ).

¹See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived by governmental body), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111).

The department asserts that the submitted information constitutes work product that was prepared in anticipation of litigation. The department does not demonstrate, however, that this information contains the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. Thus, this information does not constitute attorney work product under rule 192.5 of the Texas Rules of Civil Procedure. Therefore, the submitted information is not confidential under rule 192.5 and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

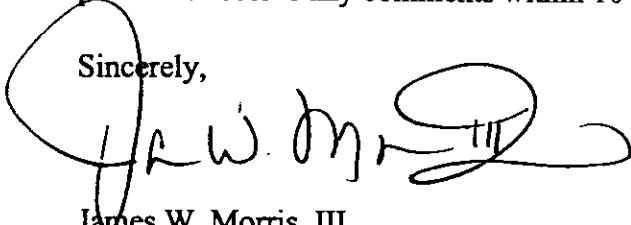
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III". The signature is written in a cursive, flowing style with a large loop at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 161076

Enc: Submitted documents

c: Mr. Ray Hensarling
130 South Charlton
Woodville, Texas 75979
(w/o enclosures)